



Eckert Seamans Cherin & Mellott, LLC
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600 Grant Street, 44th Floor
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Brett Heather Freedson
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January 6, 2017

VIA ECFS AND EMAIL

Mr. Christopher Killion, Chief
Market Disputes Resolution Division
Federal Communications Commission
445 12th Street SW
Washington, D.C. 20554

Re: *Verizon Virginia LLC and Verizon South Inc. v. Virginia Electric and Power Company d/b/a Dominion Virginia Power* (Docket No. 15-190)

Dear Mr. Killion:

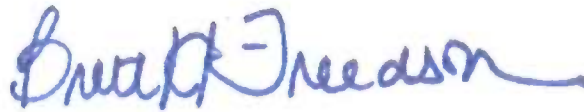
This responds to Verizon's letter dated December 27, 2016, once again alleging that Dominion is unreasonable in its efforts to enforce binding joint use agreements that, to date, remain in full force and effect. Verizon already demanded that the Commission dramatically reduce annual pole rental rates to which it agreed, without any resultant impact on the benefits that it receives, and continues to receive through its voluntary joint use relationship with Dominion. Now, Verizon intimates that Dominion should not be entitled to exercise the default remedies prescribed under the parties' joint use agreements despite Verizon's outright refusal to pay the fee amounts due for its attachments.

The right to place attachments on Dominion's poles is voluntarily granted to Verizon, and is subject at all times to the terms set forth in the parties' joint use agreements. Those terms include reciprocal pole rental rates that the parties negotiated over several years, in the context of an active rulemaking before the Commission. Moreover, because Verizon signed the agreed upon pole rental rates into effect *after* the Commission released its order interpreting Section 224(b), it is assured that Verizon had ample time to consider the reasonableness of those rates, relative to the benefits that Dominion provides to Verizon. Verizon attached to Dominion's poles, and paid pole rental fees at the agreed upon rates for three (3) years, without ever questioning the lawfulness of those rates. In fact, it was not until the parties' negotiations for an adjustment to existing pole rental rates under the joint use agreement terms failed that Verizon fabricated its present claim. Despite continuing to maintain its attachments on Dominion's poles, Verizon then resorted to self-help, withholding from Dominion an amount of \$10,453,690.45, and breaching its clear contractual obligation to remit all annual pole rental fees invoiced under the parties' joint use agreements notwithstanding any pending disputes. Under these circumstances, it is ironic, and particularly disingenuous that Verizon would complain of Dominion declining to permit new attachments, where Verizon expressed in no uncertain terms its intention *not* to fully compensate Dominion for such attachments.

The recent action taken by Dominion is one of several remedies authorized under the parties' joint use agreements in the event of Verizon's default. Dominion provided to Verizon written notice of its default on October 13, 2016, and accorded Verizon the required period of sixty (60) days within which to cure. Rather than remit the fee amounts due under those agreements, Verizon applied its own arbitrary pole rental rates for calendar year 2016, and paid an amount equal to only 3.5 percent of the total amounts invoiced.¹ Nothing in the parties' joint use agreements allows Verizon to remit only undisputed pole rental fee amounts pending the outcome of current litigation, and to the extent that Verizon refuses to perform its contractual obligations, it also must bear the consequences of its default. It is reasonable that Dominion, or any business would discontinue providing services for which the recipient is no longer willing to pay agreed upon charges. Dominion certainly intends to restore Verizon's full rights under the joint use agreements, at such time as Verizon's outstanding debt is paid.

For the Commission's convenience, please find attached all communications between Dominion and Verizon regarding this matter.

Respectfully submitted,



Brett Heather Freedson

cc: Rosemary McEnery
Lisa Boehley
Christopher Huther

¹ Dominion's notice to Verizon also covers unpaid pole rental fees in the total amount of \$4,484,541.75, for the 2015 calendar year.

Dominion Virginia Power
701 East Cary Street, Richmond, VA 23219

Mailing Address: P.O. Box 26666
Richmond, VA 23261-6666

dom.com



December 13, 2016

BY FEDERAL EXPRESS AND U.S. MAIL

Verizon South Inc.
Attention: Section Manager-Joint Use and Licensing
3011 Hungary Spring Road, 2nd Floor
Richmond, VA 23228

Verizon Virginia Inc.
Attention: Section Manager-Joint Use and Licensing
3011 Hungary Spring Road, 2nd Floor
Richmond, VA 23228

Re: Default Under General Joint Use Agreements

Dear Sir or Madam:

On October 13, 2016, Virginia Electric and Power Company d/b/a Dominion Virginia Power provided written notice to each of Verizon South Inc. and Verizon Virginia Inc. (collectively, "Verizon") of five (5) separate breaches constituting Default under the parties' General Joint Use Agreements.¹ In accordance with the General Joint Use Agreements, Dominion afforded Verizon sixty (60) days within which to cure its Defaults.² The cure period has expired, and to date, Verizon has not cured, or even worked to cure its Defaults.³ Therefore, pursuant to Article 13.04(b) of the General Joint Use Agreements, effective immediately, Dominion declines to authorize any additional attachments requested by Verizon under the General Joint Use Agreements. In addition, also effective immediately, Dominion reserves the right to remove, without any further notice to Verizon, and without any liability therefor, any attachment made without Dominion's authorization in violation of this mandate. Furthermore, Dominion reserves the right to effect any one, or all, of the additional remedies prescribed in the General Joint Use Agreements, and any other remedies available at law or in equity.

Thank you for your attention to this important notice.

Sincerely,

Anthony Barni
Manager, Electric Distribution Design

¹ See Letter from Anthony Barni, Dominion Virginia Power, to Verizon South Inc. and Verizon Virginia Inc. (dated Oct. 13, 2016).

² General Joint Use Agreement between Verizon South Inc. and Virginia Electric and Power Company d/b/a Dominion Virginia Power, dated Jan. 1, 2011; General Joint Use Agreement between Verizon Virginia Inc. and Virginia Electric and Power Company d/b/a Dominion Virginia Power, dated Jan. 1, 2011 (together, "General Joint Use Agreements"), Art. 13.03.

³ See Letter from Brett Heather Freedson, counsel to Dominion Virginia Power, to David Gudino, Area Counsel – Mid-Atlantic, Verizon (dated Nov. 17, 2016).

Dominion Virginia Power
701 East Cary Street, Richmond, VA 23219

Mailing Address: P.O. Box 26666
Richmond, VA 23261-6666

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cc: General Counsel
Verizon Services Corporation
One Verizon Way, 4th Floor
Basking Ridge, NJ 07920

Christopher S. Huther, Esq. (email)
Patrick D. Blake, Esq. (email)



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Christopher S. Huther
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December 9, 2016

VIA E-MAIL AND U.S. MAIL

Brett Heather Freedson, Esq.
Eckert Seamans Cherin & Mellott, LLC
U.S. Steel Tower
600 Grant Street, 44th Floor
Pittsburgh, PA 15219

Re: *Dominion Notice of Default under the Joint Use Agreements between
Virginia Electric and Power Company d/b/a Dominion Virginia
Power and Verizon Virginia Inc. and Verizon South LLC*

Dear Ms. Freedson:

This responds to your November 17 letter to David Gudino in which you asked that future correspondence about Mr. Barni's October 13 letter be directed to you.

Mr. Gudino or I would have responded directly to you previously had there been any indication in Mr. Barni's letter that Dominion had retained you or your law firm in connection with his letter. Instead, Mr. Barni wrote directly to represented individuals at Verizon without copying me, Patrick Blake, you, or anyone else at your law firm. Indeed, I understand that when Verizon's counsel presented a copy of Mr. Barni's letter to a witness during a recent deposition in the state court case, Mr. Zdebski claimed that Mr. Barni's letter was not relevant to the state court proceeding. Regardless, since you have now directed that Verizon's future correspondence on this matter be sent to Dominion's outside counsel, I would also request that any correspondence from your firm be directed to me, rather than Verizon's in-house counsel.

I have received a copy of Mr. Barni's letter, which claims that Verizon is in default of the Joint Use Agreements. Verizon is not in default, as Mr. Gudino explained in his November 1 letter. I will not repeat those reasons, but will instead address some of the many flaws in your response to him.

First, your letter claims that Verizon is in default with respect to pole attachment rental payments – but defines an “actionable Default” as a “breach[] of the General Joint Use Agreements.” Verizon has committed no such breach. No court has found that it has. The only breach that occurred with respect to the Joint Use

Brett Heather Freedson, Esq.

December 9, 2016

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Agreements was a breach by *Dominion*, which refused to engage in good faith negotiations and comply with the law as contractually required. *Dominion's* prior breach excused Verizon's performance and eliminates any basis for claiming that Verizon has defaulted. Moreover, Verizon's good faith payments of the undisputed 2015 and 2016 pole rent were made with the express representation that Verizon would pay any additional sums the FCC should find to be due under federal law. By contrast, *Dominion* has taken the position that Verizon is not entitled to a refund of its substantial overpayments for the 2011 through 2014 pole rent.

Second, your letter relies on Article 33.06 to establish breach, but that Article says nothing about the amount of pole attachment rent that Verizon must pay. It solely sets the time for payment. The amount is determined by the entire agreement, including its requirements for good faith negotiations and compliance with the law.

Third, your claim that Verizon is not working toward a cure of the rental rate dispute is particularly disingenuous. As you well know, Verizon has expended significant time and resources in its effort to cure the situation that *Dominion* created when it refused to honor its agreement and the law. Indeed, there can be no question that Verizon's request at the FCC falls squarely within another definition for "cure" in Black's Law Dictionary: "to correct one or more legal errors."

Finally, you continue to assert that Verizon is in default for an alleged failure to indemnify and defend *Dominion* in connection with the Washington Green litigation. This is also wrong. Although you claim that "[i]t was Verizon's refusal to cooperate with both *Dominion* and the landowner that triggered this landowner's suit," the lawsuit occurred because *Dominion* failed to inform anyone (Verizon or the landowner) that it had a pre-existing easement that expressly authorized Verizon's facilities. As a result, *Dominion* should have borne the cost of the litigation under Article 3.02, which obligates *Dominion* in cases that are "caused solely by its negligence, or intentional fault."

Moreover, the timing of *Dominion's* default notice regarding the Washington Green matter is puzzling. Verizon resolved the litigation promptly and at no apparent cost or expense to *Dominion*. Indeed, an Order dismissing the Washington Green litigation was entered by the Court on October 7, nearly a week *before* Mr. Barni's letter claiming default. And the project is now complete. The facilities have been placed underground, the poles at issue have been removed, and the property has been fully restored. To the extent *Dominion* did bear any costs related to the

Brett Heather Freedson, Esq.

December 9, 2016

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matter, it must seek them through the parties' Article 14 dispute resolution process. To date, we have not seen any estimate of the costs Dominion has allegedly incurred, much less any request for a meeting to discuss a good-faith resolution to the dispute pursuant to the agreement's terms. Dominion cannot simply skip these steps in order to manufacture a claim of default.

Sincerely,

A handwritten signature in black ink, appearing to read "CH", with a long horizontal line extending to the right.

Christopher S. Huther

cc: David Gudino, Esq.

BY EMAIL AND U.S. MAIL

November 17, 2016

Mr. David J. Gudino, Area Counsel – Mid Atlantic
Verizon
One Verizon Way – VC61S432
Basking Ridge, New Jersey 07920

Re: Dominion's Notice of Default Under General Joint Use Agreements

Dear Mr. Gudino:

This responds to Verizon's letter dated November 1, 2016, claiming that none of its five (5) separate breaches of the General Joint Use Agreements between the Verizon entities and Dominion constitutes an actionable Default.¹ First, making no reference to specific Agreement terms, Verizon alleges that its obligation to remit *all* pole rental fees invoiced under the Joint Use Agreements must be excused based on its own meritless rate calculations, which the FCC has yet to validate. Second, Verizon alleges that Dominion's indemnification claim arising from a landowner dispute in Fairfax County, Virginia (*Washington Green*) is barred. Verizon conveniently ignores the critical fact that Dominion notified Verizon, on multiple occasions, of the need to remove its attachments from these joint use poles. It was Verizon's refusal to cooperate with both Dominion and the landowner that triggered this landowner's suit. Dominion is never required to provide an easement to Verizon for joint use purposes, nor was Dominion obligated to negotiate with the landowner – on behalf of both Dominion and Verizon – to obtain any underground rights for Verizon's communications facilities. Dominion remains firm in the positions set forth in its Notice of Default, and will, without hesitation, avail itself of any or all of the remedies prescribed in Article 13.04 of the Joint Use Agreements if Verizon's Defaults are not cured before December 13, 2016.

Article 33.06 of the Joint Use Agreements states in clear and unambiguous terms Verizon's obligation to remit to Dominion *all* annual pole rental fees that Dominion shall invoice thereunder, at rates calculated in accordance with Article 33 and the Agreement Exhibits. No exception to this obligation is provided, for reason of the parties' dispute, litigation, or otherwise. The annual pole rental fee invoices submitted to each Verizon South and Verizon Virginia, for calendar years 2015 and 2016, indicate annual rates yielded under the Joint Use Agreement calculations, and the lawful rates that Verizon is required to remit for the time period that the Joint Use Agreements remain in

¹ See General Joint-Use Agreement between Verizon South, Inc. and Virginia Electric and Power Company, dated January 1, 2011, and General Joint-Use Agreement between Verizon Virginia, Inc. and Virginia Electric and Power Company, dated January 1, 2011 (together, the "Joint Use Agreements") at Article 13.

full force and effect. Absent any amendment to the Joint Use Agreements, or any final FCC order altering the rate framework to which the parties' mutually agreed, all annual pole rental rates must continue to be calculated in accordance with the formulas that the Joint Use Agreements prescribe. The fact that Verizon challenged the substance of the Joint Use Agreements in proceedings before the FCC does not, in itself, cause Verizon's valid payment obligations to be suspended or reduced. Moreover, as Verizon is aware, the litigation now pending in the Circuit Court for Henrico County relates only to *enforcing* the Joint Use Agreements, and will not result in any modification to the existing annual pole rental rate framework that the Joint Use Agreements provide. Under the Joint Use Agreements, Verizon South and Verizon Virginia must remit collectively the total fee amount of \$5,408,243.67 for the 2015 calendar year, and the total fee amount of \$5,045,446.78 for the 2016 calendar year; any lesser payment constitutes Default.²

Furthermore, Verizon's claim that it is "working" to cure the multiple Defaults identified in Dominion's October 13, 2016 Notice is disingenuous, and without legal effect. The term "cure" is defined as a "debtor's act to correct its failure to perform according to the terms of its agreement."³ Verizon is not endeavoring to fulfill its annual fee obligation under the Joint Use Agreements, but instead is requesting that the FCC invalidate the parties' written contract after the fact. Moreover, Verizon's argument is based entirely on FCC rule modifications that *pre-date* Verizon's execution of the Joint Use Agreements, and are not applicable to Verizon in any event. In other words, at the time it executed the Joint Use Agreements, Verizon had full knowledge of the FCC's positions, as stated in the 2011 Pole Attachment Order, and Verizon signed anyway. Verizon also proceeded to pay all amounts due under the Joint Use Agreements without protest for four (4) years. Verizon's buyer's remorse – four (4) years post-execution – does not support its short-pay behavior. Verizon is, and remains, in Default.

Article 28.01 entitles Dominion to remove its facilities, and subsequently abandon any joint use pole upon sixty (60) days' prior written notice to Verizon; and if, at the end of such sixty (60) day period, Verizon's facilities remain on the subject pole, such pole shall become the property of Verizon, and Verizon shall thereafter indemnify Dominion for liabilities that Dominion may incur as the result of Verizon's continuing use of the pole. Dominion consulted with Verizon – at least two years (2) years prior to the filing of the *Washington Green* complaint – regarding the question of whether either party possessed an easement to maintain overhead lines at 9018 Old Courthouse Road. Dominion also supplied written notice to Verizon, as the Joint Use Agreements require, not once, but four (4) times in 2015, indicating that the subject joint use pole would be abandoned.⁴ It was Verizon, however, failing to cooperate in removing its facilities from the abandoned joint use pole, whose conduct ultimately triggered the *Washington Green* litigation.

² "Default" is defined as the failure of [Verizon] to follow, adhere to, or comply with one or more provisions of the Joint Use Agreements. Article 13.01.

³ Black's Law Dictionary 464 (10th ed. 2014).

⁴ Dominion notified Verizon of the need to remove its facilities from the abandoned pole at 9018 Old Courthouse Road on the following dates in 2015: April 28, September 3, September 4, November 3.

In closing, as you undoubtedly are aware through your apparent knowledge of the litigation before the FCC, and the Circuit Court for Henrico County, Mr. Barni and all Dominion personnel are represented in this matter by in-house counsel, as well as the law firm of Eckert Seamans. The Virginia Rules of Professional Conduct prohibit direct communications such as your November 1, 2016 to any individual at Dominion, for any reason whatsoever, absent the consent of Dominion's counsel, or the court's authorization.⁵ Kindly direct all future communications to the undersigned.

Please remain mindful, as stated in Dominion's Notice of Default dated October 13, 2016, should Verizon continue on its reckless course of refusing to cure all five (5) of its current Defaults under the Joint Use Agreements before December 13, 2016, Dominion reserves the right to pursue any and all remedies available under the Joint Use Agreements and other applicable law.

Sincerely,



Brett Heather Freedson

cc: Christopher Huther (email)
Patrick Blake (email)

⁵ Virginia Rules of Professional Conduct, 4.2.



David J. Gudino
Area Counsel - Mid Atlantic
Legal Department

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One Verizon Way
Basking Ridge, NJ 07920
Phone 908 559-5565
Fax 908 204-3258
david.gudino@verizon.com

November 1, 2016

VIA FEDERAL EXPRESS

Anthony Barni
Manager Electric Distribution Design
Dominion Virginia Power
701 East Cary Street
Richmond, VA 23219

Re: Dominion Notice of Default under the Joint-Use Agreements between Virginia Electric and Power Company d/b/a Dominion Virginia Power, and Verizon Virginia Inc. and Verizon South LLC

Dear Mr. Barni:

This responds to your October 13, 2016 letter, which purports to notify Verizon of a default under Article 13 of General Joint Use Agreements between Dominion and Verizon, dated January 1, 2011, on two grounds. First, Dominion alleges that Verizon has failed to remit full payment for pole attachment rental fees due Dominion for the years 2015 and 2016. Second, Dominion asserts that Verizon has failed to indemnify and defend Dominion in connection with a lawsuit filed in Fairfax County, Virginia, styled *Washington Green No. 1, LLC v. Virginia Electric and Power Co., et al.*, (No. CL-2016-09563).

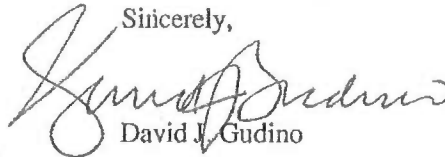
Verizon is not in default under the terms of the General Joint Use Agreements for either of the alleged reasons specified by Dominion. As Dominion is aware, Verizon has initiated a complaint proceeding at the FCC to determine the lawful pole attachment rates that Dominion may charge under the FCC's rules. In the interim, Verizon is making annual rent payments to Dominion based on the FCC's new telecom rate calculation formula. There also is a pending state court lawsuit to determine whether Dominion is entitled to the rates that it seeks or whether, as Verizon claims, Verizon has been damaged by Dominion's failure to negotiate in good faith regarding the pole attachment rates to be charged. Until those matters are concluded there is no basis for your claim that Verizon is in "default" by failing to pay the unlawfully high rates demanded in your invoices.

Moreover, separate and apart from the question of whether there even is a default, Dominion cannot exercise any of its default rights because Verizon, through its FCC action and the state court proceeding, is "working towards a cure," as provided in Article 13.04. In this regard, Verizon is prepared to make any true-up payments that may be required once there is a final ruling in those matters.

Mr. A. Barni
November 1, 2016
Page 2

There also is no basis for Dominion's claim for indemnity in the *Washington Green* matter. Indeed, Verizon has sought indemnification from Dominion because the entire lawsuit could have been avoided had Dominion acted in good faith toward Verizon under the agreement. Dominion apparently was contacted by the landowner regarding its legal authority to be on the pole long before the lawsuit was filed. Rather than notifying Verizon of the right of way issue pursuant to Section 25.02 of the agreement, or inviting Verizon to participate in Dominion's negotiations with the landowner to obtain an easement and relocate its facilities underground, Dominion simply made its own deal, then notified Verizon that it was abandoning the pole, without any warning of the property owner's potential trespass claim. Despite Dominion's tactics, Verizon resolved the property owner's claim by paying for its own easement without any monetary contribution from Dominion. Had Dominion worked with Verizon early on to address the property owner's complaint, the matter could have been resolved without the need for litigation. Under Section 4.03(d), Dominion's failure to promptly notify Verizon when it first became aware of the issue bars its claim for indemnity.

Sincerely,

A handwritten signature in dark ink, appearing to read "David J. Gudino", written in a cursive style.

David J. Gudino

Dominion Virginia Power
701 East Cary Street, Richmond, VA 23219
Mailing Address: P.O. Box 26666
Richmond, VA 23261-6666
dom.com



October 13, 2016

BY FEDERAL EXPRESS AND U.S. MAIL

Verizon Virginia, Inc.
Attention: Section Manager-Joint Use and Licensing
3011 Hungary Springs Road, 2nd Floor
Richmond, VA 23228

Verizon South, Inc.
Attention: Section Manager-Joint Use and Licensing
3011 Hungary Springs Road, 2nd Floor
Richmond, VA 23228

Re: Notice of Default under the General Joint-Use Agreements between Virginia Electric and Power Company d/b/a Dominion Virginia Power and Verizon Virginia, Inc., and Verizon South, LLC

Dear Sir or Madam:

On behalf of Virginia Electric and Power Company d/b/a Dominion Virginia Power ("Dominion Virginia Power"), I am providing this Notice of Default pursuant to Article 13 of the General Joint-Use Agreements between Verizon Virginia, Inc. ("Verizon Virginia") and Verizon South, LLC ("Verizon South"), (collectively, "Verizon") dated January 1, 2011.

The defaults include:

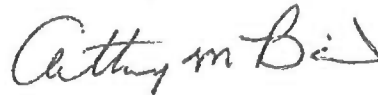
1. Failure to remit full payment for the June 8, 2015 invoice for \$4,402,724.57 from Dominion Virginia Power to Verizon Virginia for annual pole rental fees for the 2015 calendar year;
2. Failure to remit full payment for the June 8, 2015 invoice for \$1,005,519.10 from Dominion Virginia Power to Verizon South for annual pole rental fees for the 2015 calendar year;
3. Failure to remit full payment for the August 26, 2016 invoice for \$1,004,924.30 from Dominion Virginia Power to Verizon South for annual pole rental fees for the 2016 calendar year;

4. Failure to remit full payment for the August 26, 2016 invoice for \$4,040,522.48 from Dominion Virginia Power to Verizon Virginia for annual pole rental fees for the 2016 calendar year; and
5. Failure by Verizon Virginia to indemnify and defend Dominion Virginia Power in the case styled *Washington Green No. 1, LLC v. Virginia Electric and Power Co. and Verizon Communications, Inc.*, No. CL-2016-09563 (Fairfax County, Virginia Circuit Court), as required by Articles 3.01, 3.02, 4.02 and 4.03 General Joint-Use Agreement between Dominion Virginia Power and Verizon Virginia.

Pursuant to Article 13.03 of the General Joint-Use Agreements, Verizon must cure the above defaults within sixty (60) days.

Dominion reserves all rights and remedies pursuant to law, equity, contract, statute and common law, including but not limited to Dominion's rights under Article 13.04(a)-(c) of the General Joint-Use Agreements. Thank you for your attention to this matter.

Sincerely,



Anthony Barni

Manager Electric Distribution Design
Dominion

cc:

General Counsel (via Federal Express and U.S. Mail)
Verizon Services Corporation
One Verizon Way, 4th Floor
Basking Ridge, NJ 07920

Horace P. Payne, Esquire (via electronic mail)

